IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 150/08
5090156

BETWEEN	ALLIE REID Applicant	
AND	BURGATS ENTERPRISES LIMITED Respondent	

Member of Authority:	James Crichton
Representatives:	Sally McRae, Advocate for Applicant No appearance for Respondent
Investigation Meeting:	2 October 2008 at Christchurch
Determination:	7 October 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Reid) was employed by the respondent (Burgats) principally as a telemarketer but also had a brief period of employment with Burgats as a cleaner.

[2] Ms Reid told me in her oral evidence that she had initially been employed as a telemarketer on 8 May 2006 by Burgats' predecessor and that when the ownership of the employer changed in December 2006, she simply continued her employment in telemarketing with the new employer, Burgats.

[3] Ms Reid says that she was offered the cleaning role by Burgats because she was looking for more income and it was looking for a cleaner. In fact, the cleaning role was of very short duration and Ms Reid told me that she thought it lasted about four weeks from somewhere in March to somewhere in April 2007. Ms Reid was not

sure what hourly rate she was paid to do the cleaning work but assumed it was the same rate she was paid as a telemarketer.

[4] The terms of Ms Reid's employment as a telemarketer were covered by a letter dated 13 December 2006 offering her employment and attached to that letter are detailed terms of employment. Ms Reid accepted the offer of employment by signing and dating the offer on 27 December 2006.

[5] Ms Reid told me that she thought the relationship between her and Burgats was *okay*, but she noted that she had raised with the employer some problems that were being caused in the workplace by a co-worker and that the employer had turned that matter around on Ms Reid so as to effectively make Ms Reid the *guilty* party. Ms Reid thought this unfair and said so at the time.

[6] By letter dated 16 March 2007, Burgats gave Ms Reid a written warning, essentially complaining about Ms Reid's timekeeping, but also referring to an earlier verbal warning about which Ms Reid has no recollection.

[7] Ms Reid obviously took some time to consider the import of this written warning, but by letter dated 26 April 2007, she wrote to Burgats and following a suggestion from Burgats in its warning letter, asked for a meeting to discuss matters. In her letter of 26 April 2007, Ms Reid referred specifically to the allegation of poor timekeeping (which she denied), and her desire to get a better system for taking goods home on appro which she had done occasionally and made informal arrangements with Burgats about.

[8] Ms Reid says that she presented her letter to the director of Burgats, Rita Gatenby-Burgess. Ms Reid's evidence is that Ms Gatenby-Burgess became very angry and was *practically screaming* at her. Ms Reid's evidence is that Ms Gatenby-Burgess turned Ms Reid's presentation of her letter into a formal meeting and had another member of staff come and take notes. Ms Reid said that Ms Gatenby-Burgess concluded this meeting by saying that she would be calling in her lawyer.

[9] On 30 April 2007, Ms Gatenby-Burgess wrote to Ms Reid and summoned her to a meeting. That letter referred to *my prior verbal warnings to you and my written warning dated 16 March 2007* and said that the discussion would *directly relate to your future employment* …. The letter concluded with a reference to Ms Reid being

entitled to bring a support person. There were two venues suggested for the meeting; one of those venues was at the offices of Burgats' lawyer.

[10] Despite the warning note in that letter of 30 April 2007 implying that Burgats' lawyer was or might be involved in the meeting, referring to previous disciplinary warnings and, most importantly, saying that the meeting would impact *directly* on Ms Reid's future employment, Ms Reid formed the mistaken view that the meeting was simply designed to deal with her issues in a consensual way and she absolutely failed to pick up signals that the employer was using this as an opportunity to have a pretty serious discussion about issues the employer had with Ms Reid's continued employment.

[11] Ms Reid's view of the meeting can best be seen from her observations about it. She told me that she was:

> *… quite confident when I went into the meeting that we could get my issues resolved and I didn't expect to be having to defend myself against their allegations. I had to defend myself against her and her lawyer. I was alone. Even at the end of the meeting, I thought that Ms Gatenby-Burgess was proposing we carry on with the employment and fix a few things up.*

[12] By the end of the meeting, Ms Reid is referring to the end of the first part of the meeting before the employer and the employer's lawyer retired to consider their position.

[13] The notes of this meeting, which took place on 3 May 2007, have been made available to the Authority. They were prepared by the employer's lawyer. Ms Reid told me that she had some issues with the accuracy of the minutes, but agreed that reading the minutes would give me a flavour of the meeting *to some extent*.

[14] The first part of the meeting then is concerned with a discussion about a number of issues, the first relating to Ms Reid's alleged absence problem and the second relating to her allegedly taking clothing on appro without making proper arrangements. Then there was a discussion about the alleged verbal warning (Ms Reid's evidence was that she had no recollection of receiving that warning), and she made that clear at the meeting according to the notes, then there was a discussion about the exchange of correspondence starting with Ms Reid's request for a meeting and the employer's response, with the last section traversing the meeting the parties had when Ms Reid handed over her letter requesting the meeting.

[15] The meeting recommenced at 4.10pm after the employer and its lawyer had considered the matters discussed. Ms Reid told me that she expected that she would simply start work at 5pm (as normal) and that the employer would agree to resolve what she referred to as *a few bits and pieces*. She was particularly surprised then when the employer indicated to her that she was dismissed and Ms Reid is adamant that the employer's lawyer referred to her as having committed theft by reason of the issues around her taking garments on appro.

[16] It is clear that when the employment relationship ended, Ms Reid owed Burgats money in respect of garments that she had taken on appro and Ms Reid's evidence was that she expected that the employer would use the power it specifically had written into the employment agreement to clear any outstanding indebtedness from her final pay. However, she received her final pay without deduction and by letter dated 22 May 2007, she raised a personal grievance alleging unjustified dismissal.

[17] Then, shortly after that, she received a visit from the Police and was subsequently presented with a summons to appear before the District Court on 4 June 2007 to answer two charges of theft.

[18] Ms Reid's view was that this action by the employer was a direct result of her raising a personal grievance and she considered that her view of matters was given further credence by the fact that during the criminal proceedings in the District Court, there were various attempts to resolve the criminal matter by agreement but on each occasion Burgats' lawyer made it clear that their instructions were that the criminal matter would only be capable of resolution if Ms Reid dropped the employment matter as well. In the result, the informations against Ms Reid were dismissed by the District Court on 13 March 2008.

[19] Burgats was unrepresented at my investigation meeting. Its absence was not unexpected. Burgats had been engaged with the Authority's process up to but excluding the investigation meeting. Burgats had filed a statement in reply, attaching certain relevant documents and had participated, through counsel, up to and including a telephone conference I convened on 19 August 2008 at which the date of the investigation meeting was set. During that telephone conference, counsel made clear that Burgats had or was in the process of ceasing trading, had no assets and therefore was in no position to meet any award of the Authority. Immediately prior to the

investigation meeting, counsel for Burgats confirmed that they would not be appearing on behalf of their client and that their instructions were that their client would not appear itself.

[20] Before proceeding to take Ms Reid's evidence (as the only witness for the applicant), I spent some time satisfying myself that Ms Reid understood that if she were to be successful in her application, that success might be pyrrhic as it appeared Burgats had no ability to satisfy an award of the Authority. I also made clear to Ms Reid that, were she unsuccessful, Burgats might still be able to interest the Authority in a modest costs award against Ms Reid, notwithstanding that it had not appeared in the Authority's investigation meeting. Ms Reid acknowledged that she had given consideration to those matters, having been advised of them by her advocate, but that she wished to proceed, particularly because she was incensed about the criminal prosecution which Burgats had embarked upon against her which she saw as punitive and retaliatory.

[21] The Authority needed to consider whether it was proper to continue in the absence of the respondent employer, and the conclusion was reached that the respondent employer had made a conscious decision not to engage and that that decision had been explicitly communicated to the Authority immediately prior to the meeting. Further, the Authority had on its file a reasonably comprehensive paper trail of the employer's process and so was in a position to form some judgements about what had happened in the absence of any employer witnesses. That being the position, the decision was taken to proceed with the investigation meeting.

[22] Ms Reid alleges that she has been unjustifiably dismissed and that she has suffered disadvantage as a consequence of unjustified actions of the employer.

[23] Burgats deny both claims and say that the dismissal was justified and achieved using a correct process.

Issues

[24] The first issue is whether Ms Reid was the victim of a disadvantage as a consequence of unjustifiable actions of her employer and because Ms Reid relies on a number of separate instances it will be useful to analyse each in turn.

[25] The second issue revolves around the claim of unjustified dismissal and that essentially concerns the process and justification around the termination of Ms Reid's employment and particularly the final meeting and events leading up to it.

Was Ms Reid disadvantaged by the warning process?

[26] Ms Reid received a written warning on 16 March 2007 which referred to an earlier verbal warning which Ms Reid has no recollection of. Dealing with the verbal warning first, in the absence of any better evidence from Burgats, I find that that verbal warning was not properly effected and therefore is of no force or effect. Ms Reid told me that she had no recollection of having received it and there was no documentary evidence of it having been issued. Furthermore, Ms Reid told the employer at the final meeting on 3 May that she had no recollection of the warning and the minutes as I read them (taken by the employer's lawyer) do not present any countervailing argument to justify the employer's conviction that there was an earlier verbal warning.

[27] That leaves us to deal with the written warning. Ms Reid contends the written warning was unjustified and, although she took some time to take steps, she quite properly raised her objection to that warning by her own letter written directly to the employer.

[28] I am not satisfied Ms Reid suffered disadvantage as a consequence of receiving the written warning; the employer is entitled to warn its employees about matters of concern to it and employees are entitled to protest (as happened in this case), if they consider the warning to be unjustified. In my judgment, none of the foregoing particulars can ground a claim that Ms Reid has suffered disadvantage as a consequence of an unjustified action of the employer. First, working backwards, there is no evidence of disadvantage, Ms Reid having taken the matter up on her own behalf, and second there is nothing improper in the employer warning an employee for matters of concern to it.

Was the meeting fairly called?

[29] Ms Reid maintains that Burgats effectively took over her proposal for a meeting and turned that meeting into a disciplinary one. I do not accept that view. The factual position was that the written warning was issued on 16 March 2007 and in

that letter there was the suggestion that a meeting could be arranged if Ms Reid wanted one.

[30] By letter dated 26 April 2007, Ms Reid did precisely that. She wrote to her employer protesting about the warning and seeking a meeting.

[31] Then by letter dated 30 April 2007 Burgats accepted the suggestion that a meeting take place and proposed what arrangements should apply. As I have already noted, amongst other things the employer's letter makes clear that the meeting would concern itself with *your future employment.*

[32] It follows that I am not persuaded that Burgats have done anything improper in arranging this meeting. The idea for the meeting was originally suggested by Burgats, adopted by Ms Reid and then finally accepted together with details pertaining to the arrangements for the meeting by Burgats. In those circumstances, Ms Reid's contention that Burgats have somehow *blindsided* her it not sustainable.

Was the notice of meeting adequate?

[33] I am satisfied that Burgats gave Ms Reid proper notice of the nature and extent of the meeting and of its fundamental purpose. The letter dated 30 April 2007 clearly sets out that Ms Reid's future employment is in issue, encourages her to bring a support person and refers to one of the possible venues for the meeting as being Burgats' lawyers office. While it is true that the letter does not specifically say that Burgats' lawyer would be present, the implication is clear enough.

[34] In my opinion, the letter goes far enough to meet the employer's obligations to give the employee a fair and reasonable opportunity to be aware of the nature and extent of the subject matter for the meeting. That Ms Reid attended the meeting without representation and in the mistaken belief that it was less serious than it actually was says more about her confidence than it does about any inadequacy in Burgats communication skills.

Was Ms Reid given a fair opportunity to be heard?

[35] The meeting which Ms Reid chose to attend on 3 May 2007 without representation was, I have found a disciplinary meeting, and I have also found that

Burgats correctly signalled that intention to Ms Reid. Ms Reid either misread the message that the matter was serious or chose to ignore it.

[36] However the question now becomes whether Ms Reid was given a proper hearing at the disciplinary meeting. The minutes of that meeting are before the Authority and Ms Reid accepts *to some extent* they would give the Authority a flavour of the meeting. She emphasised in her oral evidence that in reviewing the minutes of the meeting, I was also to have regard to her various margin notes which made corrections to the minutes from her point of view.

[37] Those minutes disclose that there were two primary issues that were of concern to the employer. One relating to time keeping and the other relating to the arrangements Ms Reid either had or had not made in respect to taking goods on appro.

[38] I am satisfied that on both of these issues, Burgats has erred in the conclusions that it has eventually reached. Dealing first with the question of time keeping, the minutes disclose that there was a serious factual difference between the parties which seems not to have been resolved adequately during the meeting. Yet, Burgats chose to proceed with the information it relied upon at the beginning of the meeting, having apparently not taken any account of the information that Ms Reid had given them. In particular, Ms Reid's contention was that some of the days she was allegedly away were not in fact working days at all (one being a Sunday) and on other occasions when she was certainly absent, her evidence was that she was on sick leave and that she had properly notified Burgats of her illness at the relevant time and in accordance with Burgats' policies and procedures. Finally, there is an absolutely fundamental difference in the total number of days of absence that are in dispute with Burgats saying that Ms Reid had 10 days of unexplained absence and Ms Reid saying that she had 4 days of sick leave.

[39] In those circumstances, a good and fair employer would be put to further inquiry by the evidence produced by the employee and would at the very least have taken time to carefully assess the employee's information. There is no evidence from the minutes that that was done.

[40] The second issue of concern to the employer was the contention that Ms Reid was improperly removing product from the employer and not accounting for it. Again there are significant factual differences. The amount of money and the number of

garments in question is disputed as is the contention that there was anything fundamentally improper in what Ms Reid was doing.

[41] Ms Reid's position in the latter regard is that she was told that she was allowed to take items home on appro. provided that she subsequently paid for them. There was a record of the relevant transactions kept in a little note book and it was agreed Ms Reid told me, that she would pay $20 per week off her outstanding account. She also told me that one of the reasons the employer gave her the extra work cleaning was to enable her to maintain that payment regime.

[42] In the result, Ms Reid was only able to make two lots of payments, that is a total of $40, off the outstanding amount. However, because some payments were clearly made, and acknowledged to have been made by the employer, it seems to me difficult for Burgats to contend that Ms Reid is behaving improperly. Burgats may say that Ms Reid is not paying back the money fast enough but the allegation, according to Ms Reid, was one of theft and indeed that was crystallised later when, after the employment ended and after Ms Reid notified her personal grievance, Burgats laId a complaint with the Police alleging that Ms Reid had stolen certain items of stock.

[43] It follows that I am satisfied that if the repayment regime was unsatisfactory then that was a matter that Burgats ought to have dealt with. There is certainly no evidence whatever before the Authority which would suggest that Ms Reid was guilty of theft and the intimation Ms Reid made in her evidence that she was accused of being a thief in the disciplinary meeting must therefore be rejected out of hand, if that intimation was made at all.

What arrangement was made to pay for appro. items?

[44] Ms Reid says that when she was dismissed on 3 May 2007, she expected that her final pay would be charged with the outstanding monies she acknowledged that she owed for goods that she had taken home on appro. She referred to an explicit clause in her individual employment agreement which allowed the employer to recover money owed in just those circumstances.

[45] However, when Ms Reid's final pay arrived, there was no deduction for the monies owed. It seems that Ms Reid took no further steps in relation to repaying the money that she clearly owed (and acknowledged that she owed) and Ms Reid's

notification of raising her personal grievance appears to have happened around the time that her final pay was received.

[46] Within some two weeks of that date, Ms Reid was visited by a member of the New Zealand Police and was subsequently charged with two counts of theft. Both those informations presumably emanated from Burgats (it seems inconceivable that the Police would have initiated the two summonses without notification from Burgats). Ms Reid contends that Burgats deliberately initiated the criminal informations in retaliation for her personal grievance claim. It is conceivable that that is the position but there is no evidence before the Authority to either confirm or deny the truth of that allegation. It is equally possible that Burgats initiated the laying of the criminal informations simply in order to obtain payment for the goods in question to which they were absolutely entitled and for which Ms Reid had made no arrangements whatever since the conclusion of the employment relationship.

[47] Ms Reid draws my attention to the exchange of correspondence between her barrister and lawyers acting for Burgats while the criminal prosecutions were on foot. She says that the correspondence (copies of which had been provided in evidence to the Authority) disclose attempts by Burgats to *heavy* Ms Reid into dropping her employment case in return for the withdrawal of the criminal proceedings.

[48] Certainly the correspondence makes clear that Burgats sought to resolve the employment matter as well as the criminal matter and the latter was to be disposed of by Ms Reid paying to Burgats what she owed.

[49] Again, I am not persuaded that Ms Reid has made out her allegation that Burgats behaved inappropriately in relation to the negotiations around the various proceedings. The fact is that the same correspondence discloses that there were negotiations between counsel in an effort to try to resolve the criminal matters by agreement. That is hardly uncommon. Further, Ms Reid's counsel willingly (and quite properly) engaged with counsel for Burgats in endeavouring to resolve matters by agreement. It appears that the initiative for trying to deal with both matters together did come from counsel for Burgats but I am not disposed to think anything turns on that.

[50] Clearly there were discussions between counsel which, in the result, were not able to satisfactorily resolve matters and it seems to me that what each party brought

to the table by way of their instructions from their respective clients is neither here nor there.

[51] It follows that I am not persuaded that this aspect advances Ms Reid's claim to have suffered disadvantage as a consequence of unjustifiable actions of Burgats.

Determination

[52] I am satisfied Ms Reid has been unjustifiably dismissed for the reasons I identify above but I do not consider that her claim that she has also suffered disadvantage because of unjustifiable actions of Burgats has been made out. It follows that Ms Reid is entitled to remedies in respect of the unjustified dismissal claim only.

[53] Before considering remedies, I need to consider the question of contribution. There are two aspects to that question. The first is whether Ms Reid's problems with attendance *contributed towards the situation that gave rise to the personal grievance.* I do not think that her behaviour in respect to absence from the work place was a contributing factor. Ms Reid's view of her attendance was factually different from that of the employer and she made that clear both at the disciplinary meeting on 3 May 2007 and in evidence before me. She said that she was sick from time to time (clearly she did not enjoy good health) but that when she was sick she always followed the employer's policies and procedures. Further, she denied absolutely the total number of days absence which the employer claimed.

[54] However, the position is different in respect to the second matter which clearly impacted on the employer's decision to dismiss. This is the question of Ms Reid's behaviour in taking goods home on appro. There is nothing improper in that in itself although one might question the sense in doing that when the ability to pay for those goods was obviously in question. Further Ms Reid had an absolute obligation to make good on her promise to pay the employer for what she took and her failure to do that reflects badly on her and certainly ought to be taken into account in assessing the employer's obligations to remedy Ms Reid's personal grievance.

[55] After all, Ms Reid would have known as soon as she got her final pay that the employer had failed to deduct the monies owed and yet the evidence discloses that she took no steps whatever to pay for the clothing that she had taken, just as she had been prepared to rely on the employer tidying the matter up by deducting the money owed

from her final pay when the dismissal became inevitable. Arguably, if Ms Reid had been more forthright in undertaking the payment regime and more measured in taking on debt, that aspect of the basis for the dismissal might well have disappeared. I assess Ms Reid's contribution at 25%.

[56] To remedy Ms Reid's personal grievance I direct that Burgats is to pay to Ms Reid the following amount which include the allowance for Ms Reid's contribution:

(a) Compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of $3,000;

(b) The filing fee of $70.

[57] There is no contribution to lost wages as a consequence of the dismissal; Ms Reid gave evidence at the investigation meeting that she had been on a sickness benefit since the dismissal.

Costs

[58] In all the circumstances I propose to fix costs at this point. As the successful party, Ms Reid is entitled to a contribution to her costs which I fix at $750.00.

James Crichton
Member of the Employment Relations Authority